IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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| MARYLAND SHALL ISSUE, ET AL., | : | |
| Plaintiffs, | : | |
| v. | : | Civil No. 485899 |
| MONTGOMERY COUNTY MARYLAND, | : | |
| Defendant. | : | |

MOTIONS HEARING

Rockville, Maryland July 19, 2022

**EXHIBIT A**

DEPOSITION SERVICES, INC.
P.O. BOX 1040
Burtonsville, Maryland 20866
(301) 881-3344

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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| MARYLAND SHALL ISSUE, ET AL., | : | |
| Plaintiffs, | : | |
| v. | : | Civil No. 485889 |
| MONTGOMERY COUNTY MARYLAND, | : | |
| Defendant. | : | |

Rockville, Maryland

July 19, 2022

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE JILL REID CUMMINS, JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

MARK W. PENNAK, Esq.
7416 Ridgewood Avenue
Chevy Chase, Maryland 20815

FOR THE DEFENDANT:

EDWARD B. LATTNER, Esq.
SEAN C. O'HARA, Esq.
Montgomery County Attorney's Office
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Rockville, Maryland 20850

Court should so hold.

THE COURT: Okay.

MR. PENNAK: I'd be happy to answer any court questions.

THE COURT: Thank you. Thank you, Mr. Pennak.

MR. PENNAK: Thank you.

THE COURT: All right. On behalf of the County.

MR. LATTNER: Thank you, Your Honor. Edward Lattner again for the County. Contrary to what I was taught in law school, I'm going to start very briefly with the least important thing, which is Bruen, which may be an elephant, but it's not in the room, and it's not in the room because there is no Second Amendment claim in this case, although plaintiffs have peppered their pleadings with references, and have filed an entire supplement dedicated to the Second Amendment. There is in fact no Second Amendment claim. So, there is nothing for the Court to decide on that issue. That's the short answer.

Beyond that, the plaintiff, I'm sorry, the county has removed the federal claims to federal court, where count four, the due process claim under the Fourteenth Amendment is still pending, and I have to imagine the county would also be seeking to remove any Second Amendment claim to federal court as well, and that's if the plaintiffs decide to amend and actually state a Second Amendment claim.

I'll also note that this is a challenge to Bill 4-21,

not to the statute as a whole. This complaint is cast, and the case has been argued as to challenge to 4-21, which was amendments to the county's firearm law with regard to ghost guns, and undetected guns. So, that's enough said about the Second Amendment.

Also, let me just, another preliminary matter. Plaintiffs refer to this repeatedly as a ban, a ban. It's not a ban. It is, it is, or it is a ban only to the extent of the presence of children, and places of public assembly, which is precisely what the state has allowed the county to regulate. It is not a, a county-wide ban on firearms throughout the county.

So, we ask that you grant the County's motion for summary judgment, and enter a declaratory judgment, finding that Bill 4-21 is not preempted by, or in conflict with state law, and does not amount to a taking under state law. My co-counsel, Sean O'Hara, will address briefly the takings claim.

The state has, it is true, expressly preempted much firearm regulation at the local level, but since 1985, in statute 4-209 of the Criminal Law Article, the state has specifically, and expressly authorized local regulation of firearms with respect to minors, and within 100 yards of or in a park, church, school, public building, and other place of public assembly. Field 4-21 fits within that authorization.

For decades the county has enacted laws under 4-209, in 1991 and again in 1997 the Attorney General opined that these county laws were specifically authorized by 4-209 and were not preempted by the more general state preemption provisions that the plaintiffs now rely on.

The plaintiffs would ask this Court to disregard that explicit authorization. Bill 4-21 extends the County's regulation to unserialize ghost guns, and undetectable guns, and the bill fits comfortably within 4-209. Unless there are any questions I wasn't going to address the standing issues. We set those out in our motion to dismiss, and instead I'd like to turn to the motion for summary judgment.

THE COURT: Okay.

MR. LATTNER: And first, the local law issue.

THE COURT: So, wait a minute. Wait a minute. So, I just want to make sure. So, now you're moving to your affirmative motion, as opposed to the opposition to the plaintiff's motion.

MR. LATTNER: Well --

THE COURT: I know they overlap. I know they somewhat overlap. I just want to be --

MR. LATTNER: Right. I'm moving --

THE COURT: -- want to be clear on what we're, where we're transitioning to.

MR. LATTNER: Yes, I'm moving from the dismissal

grounds based on standing, to the summary judgment because this Court's going to have issue a declaratory judgment, one way or the other, on the validity of Bill 4-21. So, I'm moving to the -- to our motion/opposition, their motion on validity on Bill 4-21.

THE COURT: Okay.

MR. LATTNER: And the first issue under that is the issue of local law, and I'll note as an initial matter, the argument that the County has exceeded its authority under the Express Powers Act, fails because in enacting Bill 4-21, the County was not acting under the Express Powers Act. It is acting under a grant of authority outside the Express Powers Act.

I think the plaintiffs have led us down a road of Express Powers Act, which is certainly where most of the County's authority comes from, that is true, but in this case there was a specific provision in the criminal law article, that is 4-209, that is the authority for the county to enact its firearms law. There are examples where the county exercises authority outside the Express Powers Act. The county's zoning authority comes from something called the Regional District Act, which is in the Land Use Article, I think it's Division 2 of the Land Use Article.

The County's authority to impose excise taxes also comes outside the Express Powers Act, and there are other

examples, but issues of local law, and intrusion on state interests, under the Home Rule Amendment, and the Express Powers Act, are not applicable where the county is exercising authority outside of the Express Powers Act.

Having said that, let me go on to address the Home Rule Amendment, and the Express Powers Act. Even under those authorities, the bill is a valid local law. The Home Rule Amendment, which is the amendment to the Maryland Constitution, represents a bargain of sorts. Charter counties can enact local laws on a subject covered by the Express Powers Act if it doesn't conflict with, and is not preempted by state law, and I'll be discussing preemption and conflict next.

But the Home Rule Amendment, the only definition that provides that the term local law, is a law that is limited to the jurisdiction of the county. It doesn't have any other definition, and there is only one decision the County is aware of, where a local law, a county local law was struck down even though it's impact was limited to the jurisdiction of the county, and that was because that law, it clearly intruded on well-defined state interests, and that case is McCrory versus Powell (phonetic sp.), which we discuss in our memorandum.

That was a law, that was a 1990 Court of Appeals decision, Montgomery enacted a law that purported to create a private cause of action for violation of our county local employment discrimination law, and the Court of Appeals said,

creating a new cause of action is the province of the General Assembly for the courts of Maryland under their authority to modify the common law, and so, the County does not have authority to create a private cause of action. That is not a local law, even if confined to the jurisdiction of Montgomery County.

The Court made clear that the county didn't overstep it's authority because it was addressing employment discrimination, which is a statewide problem, but because it had created a judicial cause of action. Indeed, the Maryland courts have upheld a variety of county laws that address matters of statewide concern because they were proper local laws.

For example, the county has laws regarding housing discrimination. The county has laws prohibiting discrimination in places of public accommodation, even though these are matters of public, of statewide concern, and are in fact the subject of statewide legislation. It does not mean that this is a local law. The test is not simply, oh, this is a matter of statewide concern, therefore you can't regulate that. That is not the test.

So, Bill 4-21 is a local law. It's limited to the county. It does not create a private cause of action, and more importantly, as I'll talk about some more in a minute, it's expressly authorized by 4-209.

The cases that the plaintiffs rely on are in apposite. The Home Rule Amendment also provides that once a county chooses a charter form of government, the state cannot enact a public local law for a county on a matter covered by the Express Powers Act. So, for example, the General Assembly couldn't enact a law regulating procurement within Montgomery County alone because Montgomery County has authority to address procurement under the Express Powers Act, and the General Assembly can't do that just for Montgomery County.

All the cases that are cited by the plaintiffs involve situations where a state public local law, on a subject covered by the Express Powers Act, was still held to be a permissible local law because there was some nexus to the state. So, these cases are Norris from 1937 - from 1936, Gaither from 1925. These all upheld state public local laws. These were state laws that applied only to Baltimore City, but they were still upheld because there was some state nexus in each of these cases. The cases did not involve the validity of a county local law, which is what we have here in this case.

Let me turn to preemption and conflict now, and I'll start with, as we mentioned in our paper, there is a presumption against finding preemption and conflict. First, I'll talk about express preemption. Bill 4-21 is not expressly preempted by state law, and it is in fact, it's supported by 4-209, it's supported by 4-209's plain language, it's

legislative history, and its prior interpretation. First, we'll talk about the plain language. 4-209, the criminal law article, authorized counties to regulate the purchase, sale, transfer, ownership, possession and transportation of handguns, rifles, shotguns, their ammunition, and their component parts with respect to minors, and within a 100 yards of, or in a park, church, school, public building and other place of public assembly. Bill 4-21 operates within that authority.

Now, the plaintiffs argue that the Bill's definition of place of public assembly is not supported by 4-209, but the Bill's definition of place of public assembly fits comfortably within the definition in 4-209. Again, 4-209 is not limited to parks, churches, schools and public buildings. Those are merely examples provided in the state law.

The plaintiffs criticize the Bill's inclusion of places of public assembly on private property, but 4-209 includes a church as a specific example of a place of public assembly because churches are not typically built on public land. The General Assembly made clear that a place of public assembly includes private property where the public may assemble.

The plaintiffs seek to a draw a difference between the phrase in 4-209, place of public assembly, and the bill's phrase, place where the public may assemble. The County submits there is no difference in this wording. They are

places of public assembly. It's the same thing.

Plaintiffs argue that the bill regulates ghost and undetectable guns in homes, that because it regulates, I'm sorry, ghost and undetectable guns in homes, that is therefore defined a home as a place of public assembly, that is not true. The law prohibits storing or leaving a ghost of undetectable gun in a location that person knows, or should know is accessible to a minor. That does not mean your home is a place of public assembly.

Likewise, the bill prohibits possession a ghost or undetectable gun in your home if your home is within 100 yards of a place of public assembly. That does not mean your home is a place of public assembly. That section applies, again, if your home is within 100 yards of a place of public assembly. So, Bill is consistent with the places of public assembly identified in 4-209.

Let me talk a little bit about the legislative history of 4-209, that also supports the county bill. The legislative history reveals that 4-209 was intended to be an exception to the more general express preemption found elsewhere in the state code. This is detailed in the 1991 AG opinion, that's 76 Op. Atty. Gen. Md. 240, that we discuss at some length in our motion, and I won't, I'm not going to repeat everything that's in there, but it talks about how the General Assembly passed a bill in '84. It would have removed most

local authority of over firearms. The governor vetoed that bill noting it would invalidate beneficial existing local regulation, including regulation that was related to firearms and minors, and possession in places of public assembly. The General Assembly came back with the compromise legislation allowing that exact regulation, and here we are today with 4-209.

The interpretation of 4-209 also supports our bill. The attorney general, as I mentioned before, has twice concluded that 4-209, which was Article 27, Section 36(H), before recodification, the attorney general has twice concluded that it did not preempt, and specifically authorized county regulation of firearms. You have the 1991 AG opinion that upheld County Bill 42-91, then there is the AG opinion in 1997, that's 82 Md. Op. Atty. Gen. 84 that upheld Bill 1197, which dealt with the trigger locks, and said, yes, this is permissible also under 4-209.

The AG repealed this review in the 2008 opinion. Again, this is cited in our memorandum, each time noting that 4-209(b) is an exception to the otherwise more general express preemption provisions throughout the county code that the plaintiffs rely upon.

The General Assembly is presumed to be aware of the attorney general's opinion of its statutes, and General Assembly acquiescence in prior AG opinions, is a factor in

legislative interpretation. The General Assembly did not impliedly, and silently repeal the specific authority granted to counties in 4-209 by these other statutes that the plaintiffs rely upon, that were either enacted before 4-209, or they express other aspects of fireship, I'm sorry, of firearm ownership, and, again, and this is key, you start with the proposition that when the same legislative body enacts two statutes, especially when they are part of the same legislative scheme, they have to be construed together and harmonize.

The courts will not likely find implied preemption, I'm sorry, implied repeal, unless it's demanded by irreconcilability, or repugnancy, and the plaintiffs' argument would require that you conclude that the General Assembly, without comment, has simply taken away the authority under 4-209(b). So, there are several statutes in the Public Safety Article, and this is all in the memos, 5-104, 5-133, 5-134, an uncodified provision in 1972. These all generally preempt local regulation of the sale, possession, and transfer of a regulated firearm.

These statues can and have been interpreted harmoniously with the express authority granted in 4-209, and that's what those AG opinions do, and the AG explains, using canons, using the legislative history, the canons of statutory construction that I've been talking about, how the AG has come to that conclusion.

The same logic applies to 5-507 in the Public Safety Article. This was, yes, this was enacted a year ago in 2021, and it generally preempts local regulation of the transfer of a rifle or a shotgun. The others deal with regulated firearms. This one deals with so-called long guns. Again, it is, it is inappropriate to conclude that by this statute, the General Assembly, again, sub silentio has repealed the express authority provided in 4-209, that that authority, that that authority no longer exists.

Turning to implied preemption. Implied preemption is the search for legislative intent. Its intent to preempt in the absence of express legislative guidance, and generally the Court looks to the comprehensiveness of state regulation. There is no implied preemption. First, there can be no implied preemption. There cannot be, you cannot infer an intent to preempt, where the General Assembly has expressly given the county the authority it has under 4-209(b).

And secondly, in State v. Phillips, the Maryland Court of Special Appeals case, the Court specifically rejected the argument that the state has impliedly preempted local regulation of firearms. Noting particularly the authority given in 4-209.

Finally, let me talk about conflict. The plaintiffs cite a variety of other statutes in state law in the Criminal Law Article 4-203, 4-104, and the recent state ghost gun law

was enacted just a few months ago. Again, Bill 4-21 cannot conflict with state law when it follows specific authority that the state has granted to regulate firearms with respect to minors, and within 100 yards of a place of public assembly, and that is the crucial element that's really missing from the plaintiffs cases. We are under operating under a statute that's a specific carve-out that must be read harmoniously with the other state provisions, as an exception to the general preemption that permits the local jurisdictions to go farther, and would otherwise be permissible, and to regulate, as provided in 4-209. Otherwise, 4-209(b) does not have any meaning.

We discussed the verbal test and the functional test, in our memo, I won't repeat what's there. Either way there is no conflict. The plaintiffs don't address -- there was Baltimore v. Hart that talked about the functional test. They do not address Baltimore v. Hart, or the other cases that employ the functional test.

In terms of the state ghost gun law, the recent one, you know, that law follows the federal model, and expands the definition of firearms to include unfinished frames or receivers. It requires these ghost guns to be serialized and treated as firearms. Hopefully, there will be fewer unserialized ghost guns if this works. Bill 4-21 would regulate the remaining unserialized ghost and undetectable guns

with respect to minors, and within 100 yards of places of public assembly, precisely as permitted under 4-209.

As we said in our motion, the County testified in support of the state law. It specifically referenced its Bill 4-21. The Senate Judicial Proceedings Committee floor report, and the state and house fiscal notes referenced Bill 4-21, as example of local regulation regarding ghost guns. It's an odd way indeed for the state to, you know, impliedly preempt the county's authority when the county has brought this to the state's attention, and said, yes, we're for the state law, look what we've done, and the state acknowledges this.

Plaintiffs' counsel mentioned the Angel Enterprises case. That's a case where a county law confirmed jurisdiction on a local board of appeals to adjudicate civil fines. That was a direct conflict. They may have said inconsistent. It was a direct conflict with state law. The courts in judicial proceedings article confers jurisdiction to adjudicate fines on the courts. Depending on the amount of the fine, it goes to the district court or it goes to the circuit court. County cannot give that authority to a board of appeals. That is not the situation we have here. We are operating again, 4-209, and I'll try not to repeat myself.

So, let me wrap up what I'm talking about. Yes, the state has expressly preempted much local regulation, but it's provided a specific carve-out in 4-209. The county has

exercised its authority many times since then. The attorney general has upheld that. These statutes all have to be interpreted consistently. Implied repeal is particularly disfavored unless the two statutes are determined -- that the courts have used are repugnant to one another. We ask that you ask a declaratory judgment declaring that Bill 4-21 is valid. And if there is no other questions I'll guess I'll wait for Mr. O'Hara to just briefly address the takings argument.

THE COURT: Okay. All right.

MR. O'HARA: Good morning, again, Your Honor. Sean O'Hara here on behalf of the County, and as Mr. Lattner alluded to, I'll be addressing only Count 3 of the complaint, which is the takings claim, and the plaintiffs in this case allege that there has been a taking without just compensation under both Article 3, Section 40 of the Maryland Constitution, and also Article 24 of the Declaration of Rights. Those are (unintelligible) with the Fifth Amendment due process cases, and so, the federal cases in that regard are quote, practically direct authorities on this issue. So, will be going through a myriad, some cases here, some state, some federal, but they're all applicable.

One of the key things that I think the plaintiffs misapprehend in this case, is they fail to distinguish between the different varieties of takings cases. So, there are two types of casings. There is, number one, a physical